Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–442 OF 2003
ABDUL KADIR SULAIMAN, RICHARD MALANJUM AND AUGUSTINE PAUL JJCA
10 OCTOBER 2006

Companies and Corporations — Liquidation — Proof of debt — Whether company was debtor of appellant — Loan taken by company was for benefit of third parties — whether company was the real borrower — Companies (Winding Up) Rules 1972

The appellant (plaintiff in the High Court) was a client of Labuan Securities Sdn Bhd ('LSSB'), a stock broking company, and had given several loans to LSSB. On 12 February 1999, a Special Administrator was appointed for LSSB to settle LSSB's financial problems with its creditors. As a result, all of LSSB's liabilities to its creditors as of 2 September 1999 were transferred to Balforn Holdings Sdn Bhd ('Balforn') as 'Special Purpose Vehicle' for the purpose of the proposal for settlement. Subsequently, Balforn was wound up and on 17 January 2001, the respondents were appointed as the liquidators at the creditors meeting. On 1 March 2001, the respondents as Balforn's liquidators invited the creditors to submit proof of debt through an advertisement placed in the *New Straits Times*. The appellant then submitted a proof of debt in Form 55 of the Companies (Winding Up) Rules 1972 for the amount of USD5,169,154.76, SGD3,664,417.92 and RM42,165. The appellant's proof of debt was rejected by the respondents on the ground that the money received was for the benefit of third parties and that LSSB was not the real borrower. The appellant was dissatisfied with the respondents' decision and thus filed an originating summons against the respondents seeking an order to reverse or vary the respondents' decision. The trial judge in dismissing the appellant's application held that the appellant had failed to prove that LSSB was the real borrower and that the respondents had not acted arbitrarily nor did they reject the application without reasons. The appellant appealed. The respondents submitted that it was the understanding between all parties that the loan was taken for the benefit of third parties and that LSSB's role was only to act as an intermediary to arrange for the loan. Pursuant to this understanding, the appellant would furnish loans to the clients of LSSB and the clients were required to charge the shares purchased by them to the appellant. The appellant was aware that the loan facilities were for the benefit of third parties. This was supported by a letter from Tan Eam Thong addressed to Steuben

Capital Investment (Singapore) Pte Ltd which stated in clear terms that he was the true beneficiary of the loan facilities.

Held, dismissing the appeal with costs:

The learned judge had taken into consideration the various documents tendered by both parties to support his conclusion that LSSB did not take the loan for its own benefit. Thus, the real borrowers were the third parties of which the appellant was aware. It was therefore clear that LSSB acted only as an agent for the real borrowers to the knowledge of the appellant. There was therefore privity of contract between the real borrowers, who were the principals, and the appellant. Such a contract is the contract of the principal, not that of the agent, and prima facie at common law the only person who can sue is the principal and the only person who can be sued is the principal. This rule is embodied in s 183 of the Contracts Act 1950. LSSB was thus not a debtor of the appellant (see paras 17–18).

[Bahasa Malaysia summary

Perayu (plaintif di dalam tindakan di Mahkamah Tinggi) adalah seorang klien kepada Labuan Securities Sdn Bhd ('LSSB'), sebuah syarikat broker saham dan telah memberikan beberapa pinjaman kepada LSSB. Pada 12 Februari 1999, Pentadbir Khas telah dilantik untuk LSSB bagi LSSB menyelesaikan masalah kewangan dengan pemiutang-pemiutangnya. Oleh yang demikian, kesemua liabiliti LSSB kepada pemiutang-pemiutangnya pada 2 September 1999 telah dipindahkan kepada Balforn Holdings Sdn Bhd ('Balforn') sebagai Alat Tujuan Khas ('Special Purpose Vehicle') yang bertujuan untuk cadangan untuk penyelesaian. Selanjutnya, Balforn telah digulungkan dan pada 17 Januari 2001, responden telah dilantik sebagai penyelesai di mesyuarat pemiutang. Pada 1 Mac 2001, responden sebagai penyelesai Balforn menjemput pemiutang-pemiutang untuk menghantar bukti keberhutangan melalui satu iklan yang diletakkan di dalam *New Strait Times*. Perayu kemudiannya menghantar bukti keberhutangan dalam Borang 55 Kaedah-Kaedah Syarikat (Penggulungan) 1972 untuk jumlah USD5,169,154.76, SGD3,664,417.92 and RM42,165. Bukti keberhutangan perayu telah ditolak oleh responden atas alasan bahawa wang yang diterima adalah untuk manfaat pihak ketiga dan LSSB bukanlah peminjam yang sebenar. Perayu tidak berpuas hati dengan keputusan responden dan menfailkan saman pemula terhadap responden memohon satu perintah untuk mengakaskan atau mengubah keputusan defendan. Hakim perbicaraan di dalam menolak permohonan perayu memutuskan bahawa perayu gagal membuktikan bahawa LSSB adalah peminjam sebenar dan responden tidak bertindak secara melulu dan menolak permohonan tanpa sebab. Perayu telah merayu. Responden menghujahkan bahawa adalah persefahaman di antara kesemua pihak bahawa pinjaman telah diambil untuk manfaat pihak ketiga dan peranan LSSB hanyalah bertindak sebagai perantara untuk menguruskan pinjaman. Berdasarkan kepada pemahaman tersebut, perayu perlu memberikan pinjaman kepada klien LSSB dan klien-klien adalah diperlukan untuk menggadaikan saham yang dibeli oleh mereka kepada perayu. Perayu menyedari bahawa kemudahan pinjaman adalah untuk manfaat pihak ketiga. Ini disokong oleh sepucuk surat daripada Tan Eam Thong yang dialamatkan kepada Steuben Capital Investment

(Singapore) Pte Ltd secara jelasnya menyatakan bahawa beliau adalah benifisiari yang sebenar kemudahan pinjaman tersebut.

Diputuskan, menolak rayuan dengan kos:

Yang arif hakim telah mengambil pertimbangan ke atas pelbagai dokumen yang dikemukakan oleh kedua-dua pihak untuk menyokong kesimpulannya bahawa LSSB tidak mengambil pinjaman untuk faedah dirinya sendiri. Oleh yang demikian, peminjam yang sebenar adalah pihak ketiga yang mana perayu adalah menyedarinya. Selanjutnya, adalah jelas LSSB bertindak sebagai agen bagi pihak peminjam yang sebenar di dalam pengetahuan perayu. Oleh yang demikian, priviti terhadap kontrak adalah di antara peminjam yang sebenar yang mana adalah prinsipal dan perayu. Kontrak tersebut adalah kontrak prinsipal dan bukannya agen dan prima facie di dalam *common law* seseorang yang boleh mendakwa adalah prinsipal dan seseorang yang boleh didakwa adalah prinsipal. Kaedah ini termaktub di dalam s 183 Akta Kontrak 1950. Oleh yang demikian LSSB bukanlah penghutang kepada perayu (lihat perenggan 17–18).]

Notes

For cases on proof of debt, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 368–371.

Cases referred to

Avon Downs Pty Ltd v FC of T [1949] 78 CLR 353 (refd)
Edennote Ltd, Re [1996] 2 BCLC 389 (refd)
Kentwood Constructions Ltd, Re [1960] 2 All ER 655 (refd)
Mineral Securities Ltd, Re [1973] 2 NSWLR 207 (refd)
Montgomerie & Ors v United Kingdom Mutual Steamship Association (1891) 1 QB 370 (refd)
Plantation Agencies Sdn Bhd v Haji Ariffin bin Haji Ismail [1978] 1 MLJ 219 (folld)
Tanning Research Laboratories Inc v O'Brien [1990] 169 CLR 332 (refd)
Teck Hock & Co (Pte) Ltd, Re; Morgan Guaranty Trust Co of New York v Wong Tui San & Anor (CSLR) XX [5132] (refd)
Westpac Banking Corporation & Others v Totterdell & Anor [1998] 25 ACSR 769 (refd)
Yeomans v Walker & Anor [1986] 10 ACLR 753 (refd)

Legislation referred to

Companies (Winding Up) Rules 1972 rr 92, 93
Contracts Act 1950 s 183
Moneylenders Act 1951
Pengurusan Danaharta Nasional Berhad Act 1998 s 24

Edwin Seibel (G Muden Chua with him) (Sheah, Tan & Rahman) for the appellant.
KA Gan (ML Chai with him) (Lee Hishamuddin Allen & Gledhill) for the respondents.

Augustine Paul JCA (now FCJ, delivering judgment of the court):

[1] The appellant (the plaintiff in the High Court) was a client of Labuan Securities Sdn Bhd ('LSSB'), a stock broking company, and had given several loans to LSSB. On 12 February 1999, a Special Administrator was appointed for LSSB as provided for under s 24 of the Pengurusan Danaharta Nasional Berhad Act 1998 to settle LSSB's financial problems with its creditors. As a result of the appointment a Transfer of Liability Agreement dated 30 October 2000 was entered into between the parties. Accordingly, all of LSSB's liabilities to its creditors as of 2 September 1999 were transferred to Balforn Holdings Sdn Bhd ('Balforn') as 'Special Purpose Vehicle' for the purpose of the proposal for settlement. Subsequently, Balforn was wound up and on 17 January 2001, the respondens were appointed as the liquidators at the creditors meeting. On 1 March 2001, the respondents as Balforn's liquidators invited the creditors to submit proof of debt through an advertisement placed in the *New Straits Times*. The appellant then submitted a proof of debt in Form 55 of the Companies (Winding Up) Rules 1972 ('the Rules') for the amount of USD5,169,154.76, SGD3,664,417.92 and RM42,165. On 24 May 2001, the respondents rejected the appellant's proof of debt in Form 59 of the Rules ('the respondents' decision'). The appellant was dissatisfied with the respondents' decision and thus filed an originating aummons against the respondents seeking an order to reverse or vary the respondents' decision.

SUBMISSION BY THE APPELLANT IN THE HIGH COURT

[2] By a letter of offer dated 4 July 1997 ('letter of offer'), it was agreed by both the appellant and LSSB that the appellant would advance a sum of USD3.8m only to LSSB as a loan at an interest to be calculated in accordance with the terms of the letter of offer ('loan facilities'). Pursuant to the letter of offer and subsequent verbal agreements the appellant transmitted into LSSB's account the total sum which was more than what had been agreed upon. LSSB and the respondents did not deny the receipt of the sum advanced and it was not the appellant's concern as to whether or not LSSB gave the money to another party after such acceptance. It was also not denied by LSSB and the respondents that the money was transmitted into LSSB's account. The letter of offer was clearly signed by the authorized signatories of LSSB and was witnessed by an advocate and solicitor and its contents were admitted by the respondents in their submission. It was not proved that there was an understanding between the parties that the money was for the benefit of third parties. All the documents showed that LSSB was the receiver of the money. One Tan Eam Thong has admitted that LSSB had accepted the money from the appellant. The correspondence between the appellant and LSSB did not show that the money was for the benefit of Tan Eam Thong. If in fact the loan was made to Tan Eam Thong, the respondents did not explain in their affidavits the presence of the appellant's name in LSSB's statement of affairs.

SUBMISSION BY THE RESPONDENTS IN THE HIGH COURT

[3] The appellant's proof of debt was rejected by the respondents on the ground that the money received was for the benefit of third parties and that LSSB was not

the real borrower. Even if the letter of offer was signed and accepted by LSSB it was the understanding between the parties that the loan facilities were for the benefit of LSSB's clients. LSSB only acted as an intermediary to arrange financial facilities for its clients for the purpose of purchasing shares at the Kuala Lumpur Stock Exchange ('KLSE'). There are documents to show that the appellant had knowledge that the loan was for the benefit of third parties and that they were to pledge their shares in respect of the loans which they did. There are also documents to show that the appellant had asked the third parties for additional securities such as land in Kuala Lumpur, Pulau Pinang and Bukit Mertajam for the loans. LSSB's audited accounts for the years 1997 and 1998 did not show the payment of any sum of money from the appellant to LSSB. If in fact the loan was taken for the benefit of LSSB the necessary details must have been shown in the accounts. The Transfer of Shares Confirmation Report indicated that shares were pledged by third parties who were the real borrowers. The letter from Tan Eam Thong, exhibited as exh 'TMK-9' at p 71 of exh 'OWC-3' at encl 6, confirmed that he was one of the beneficial receivers of the loan. Furthermore, the appellant made an offer to execute a new agreement to replace the letter of offer to show that Utama Impian Properties Sdn Bhd was one of the real borrowers. The appellant also did not deny that its companies Compstate Sdn Bhd, Top Venue Sdn Bhd and Bakti Barat Sdn Bhd were also the real borrowers. Accordingly, it was contended that the respondents were correct in rejecting the appellant's proof of debt and that the decision must not be interfered with unless it is such that no reasonable man could, properly instructed in the circumstances, arrive at it. The case of *Yeomans v Walker & Anor* [1986] 10 ACLR 753 was relied on in support.

A B C D E

FINDINGS OF THE HIGH COURT

[4] The learned judge of the High Court was of the opinion that the only issue to be resolved was whether the appellant had successfully proved that the loans were takeN by LSSB. He said that the onus was on the appellant to prove that the loans were taken by LSSB and in support referred to cases such as *Westpac Banking Corporation & Ors v Totterdell & Anor* [1998] 25 ACSR 769 and *Tanning Research Laboratories Inc v O'Brien* [1990] 169 CLR 332. He said that the appellant had failed to prove that LSSB was the real borrower. He also said that the respondents had not acted arbitrarily nor did they reject the application without reasons. As he said in his grounds of judgment:

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> Dari sudut prinsip undang-undang adalah jelas pelikuidasi mempunyai budi bicara untuk menerima atau menolak permohonan bukti hutang. Walau bagaimanapun, mahkamah mempunyai bidang kuasa untuk menolak atau mengubah keputusan yang dibuat oleh pelikuidasi mengenai permohonan bukti hutang. (Sila lihat Kaedah 93, Kaedah Penggulungan Syarikat 1972). Sepertimana dengan mana-mana penggunaan budi bicara, mahkamah tidak sewenang-wenangnya campur tangan melainkan jelas dan nyata pelikuidasi bertindak secara melulu (arbitrary) yakni tidak berpandu kepada prinsip-prinsip yang lumrah.
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> Alasan yang diberi oleh defendan-defendan adalah munasabah. Ini terbukti apabila 'pinjaman' yang dikatakan tidak wujud dalam lapuran audit LS bagi tahun-tahun berkenaan iaitu 1997 dan 1998. Adalah tidak dapat dinafikan bahawa lapuran audit tahunan ialah dokumen penting yang wajib dikemukakan mengikut peruntukan undang-undang bagi

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menunjukkan pergerakan aktiviti kewangan syarikat berdaftar. Sila lihat ss167, 174 Akta Syarikat 1965). Lapuran-lapuran audit LS bagi tahun-tahun yang material menggambarkan kedudukan sebenar kewangan LS dan lapuran audit tersebut tidak menunjukkan terdapatnya pinjaman oleh LS daripada plaintif. Justeru itu, pada hemat saya, pelikuidasi mempunyai asas yang munasabah untuk menolak bukti hutang plaintif. Saya berpendapat adalah tidak wajar bagi pelikuidasi menerima permohonan bukti hutang jika lapuran audit syarikat gagal menunjukkan bukti hutang. Oleh yang demikian keputusan defendan-defendan menolak bukti hutang plaintif adalah menggunakan budi bicara yang betul. Saya tidak dapat menerima hujah pihak plaintif bahawa terbukti yang LS adalah peminjam oleh kerana ada surat menyurat dan ada disebut dalam *statement of affairs* LS. Saya ingin menarik perhatian bahawa *statement of affairs* adalah penyataan oleh pengarah syarikat dalam penggulungan mengenai aset dan liabiliti. Taraf *statement of affairs* dan surat menyurat tidak setaraf lapuran audit syarikat yang diaudit oleh juruaudit bertauliah.

Seperkara lagi banyak dokumen khasnya surat-surat dan faksimili yang dieksibitkan menunjukkan bahawa plaintif mempunyai pengetahuan bahawa wang yang diterima tersebut adalah untuk faedah pelanggan-pelanggan LS bagi tujuan membiayai pembelian saham-saham di Bursa Saham Kuala Lumpur dan pelanggan-pelanggan tersebut akan mencagar saham-saham tersebut memihak kepada plaintif.

Terdapat juga pelanggan (Tan Eam Thong) yang mengesahkan bahawa beliau merupakan penerima benefisial kepada pinjaman tersebut. Surat daripada Tan Eam Thong bertarikh 16 Disember 1997 ('MKT-9' di ms 71 kepada eksh 'OWC-3' lampiran 6) mengesahkan bahawa dia merupakan penerima beneficial kepada pinjaman tersebut. Dalam hal ini plaintif mengeksibitkan faksimili bertarikh 16 Disember 2001 (eksh 'AC-1', lampiran 12) yang menunjukkan Tan Eam Thong menyatakan beliau bukan benefisial dan menafikan telah menulis surat bertarikh 16 Disember 1997. Mengenai perkara ini tiada afidavit Tan Eam Thong dikemukakan oleh plaintif untuk menunjukkan sama ada beliau adalah salah seorang benefisial atau tidak.

Plaintif mempunyai pengetahuan bahawa Utama Impiana Properties Sdn Bhd dan juga tiga syarikat plaintif sendiri iaitu Compstate Sdn Bhd, Top Avenue Sdn Bhd dan Bakti Barat merupakan peminjam sebenar dan plaintif tidak mempertikaikannya. Daripada afidavit-afidavit dan ekshibit-ekshibit yang dilampirkan kedua-dua pihak menunjukkan bahawa wujudnya persefahaman bahawa wang pinjaman tersebut adalah untuk faedah pihak ketiga iaitu pelanggan-pelanggan LS. plaintif hanya menyatakan bahawa wang tersebut telah diterima oleh LS tetapi gagal mengemukakan keterangan bahawa wang tersebut untuk faedah LS. Seandainya wang tersebut untuk faedah LS mengapakah plaintif meminta cagaran saham-saham dan cagaran tambahan seperti hartanah daripada pelanggan LS.

[5] On 29 April 2003, the learned judge of the High Court dismissed with costs the appellant's application to reverse or vary the respondents' decision made on 24 May 2001.

SUBMISSION OF THE APPELLANT BEFORE US

[6] In dealing with the rejection of the appellant's proof of debt learned counsel said that the court is not bound by the respondents' decision. He referred to *Halsbury's Laws of England* (4th Ed), Vol 7 which says at p 745:

> The court decides on the merits on the evidence before it: its function is not that of deciding merely whether the rejection was right or wrong on the evidence available to the liquidator.

[7] In further support he referred to the case of *Re Kentwood Constructions Ltd* [1960] 2 All ER 655 where Buckley J said at p 656:

> When an application was made to the court to reverse such a decision of a liquidator, evidence was filed which was commonly much fuller than the evidence available to the liquidator at the time when he decided to reject the proof, and the court was bound to decide the rights of the claimant in the light of the evidence which was before the court and not merely to express a view on whether the liquidator was right or wrong in rejecting the proof when he rejected it. … It was not merely the function of the court to say that a decision was right or wrong; it might vary the decision in any way that it thought necessary in the light of the evidence before the court. The court must approach the question de novo and determine to what extent the creditor ought to be allowed to rank as a proving creditor.

[8] Learned counsel also referred to the Singapore case of *Re Teck Hock & Co (Pte) Ltd; Morgan Guaranty Trust Co of New York v Wong Tui San & Anor* CSLR XX 5132 where in citing *Re Kentwood Constructions Ltd* [1960] 2 All ER 655, Coomaraswamy J said in his judgment:

> My decision is that the applicants' proof should be admitted as I am satisfied that in the circumstances Stearn's statutory declaration is sufficient to establish the sums claimed.

[9] Learned counsel said that there was sufficient evidence to show that the respondents had admitted that the loan was given by the appellant to LSSB. They are:

(a) The respondents did not deny in their affidavits that the appellant had given the loan to LSSB;

(b) The affidavits affirmed by Tan Miang Kieng, exhibited to the respondents' affidavits and which were used by the respondents, also did not deny that the loan was given by the appellant to LSSB;

(c) The documentary evidence clearly showed that LSSB had applied for and had received the loan from the appellant;

(d) There was no affidavit from Tan Eam Thong to support the allegation that he was the beneficiary of the loan. However, on the contrary, there was an e-mail from Tan Eam Thong to state otherwise;

(e) If the loan was in fact given to Tan Eam Thong, the respondents did not explain in their affidavits the reason why the appellant's name appeared in LSSB's Statement of Affairs.

[10] It was also submitted that the appellant did not breach any of the provisions of the Moneylenders Act 1951 and the loan agreement was therefore valid with the result that the debt can be enforced.

SUBMISSION OF THE RESPONDENTS BEFORE US

[11] Learned counsel for the respondents submitted that it was the understanding between all parties that the loan was taken for the benefit of third parties and that LSSB's role was only to act as an intermediary to arrange for the loan. Pursuant to this understanding, the appellant would furnish loans to the clients of LSSB and the clients were required to charge the shares purchased by them to the appellant. The appellant was aware that the loan facilities were for the benefit of third parties. This is supported by a letter from Tan Eam Thong addressed to Steuben Capital Investment (Singapore) Pte Ltd which stated in clear terms that he was the true beneficiary of the loan facilities. It was further submitted that LSSB was not the real borrower in respect of the loan facilities for the following reasons:

(a) the appellant had offered to execute a new agreement to replace the letter of offer in order to show that the real borrower was Utama Impian Properties Sdn Bhd which was the nominee of the actual borrower;

(b) the appellant had requested LSSB to execute a corporate guarantee in favour of the appellant as security to which LSSB did not agree;

(c) the appellant had also requested LSSB to obtain further securities from the clients who were the real borrowers;

(d) averments were made in the affidavit affirmed by Tan Miang Kieng that the real borrowers were the appellant's own companies, Compstate Sdn Bhd, Top Venue Sdn Bhd and Bakti Barat Sdn Bhd; and

(e) LSSB's Audited Accounts for the years 1997 and 1998 did not reflect any credit of money and/or payment of money from the appellant to LSSB.

[12] Learned counsel also referred to the following documents to support his submission that the respondents had correctly rejected the appellant's proof of debt:

(a) A facsimile transmission dated 14 July 1997 from the appellant to Sime Bank Berhad, Geylang, Singapore which showed that the bank was requested to expedite the letter of offer with regard to an overdraft facility for Steuben Capital Investment (Singapore) Pte Ltd for a sum of SGD5 million secured against acceptable shares by the bank to enable the appellant to instruct LSSB to transfer the shares of Rapid and Instangreen Corporation Berhad;

(b) A facsimile transmission dated 16 October 1997 from the appellant to LSSB which showed that the appellant through his solicitors had made a fresh agreement which would supersede the letter of offer and which would reflect Utama Impian Properties Sdn Bhd as the real borrower;

(c) A facsimile transmission dated 13 October 1997 from the appellant to LSSB which showed that the appellant's company was actually the real lender;

(d) A letter from the appellant to Tan Miang Kieng dated 4 December 1997 which showed that the appellant had made a request for the latter to obtain from the real borrowers additional securities such as land and properties in Kuala Lumpur, Pulau Pinang or Bukit Mertajam;

(e) Transfer of Shares Confirmation Report which showed that there were transfers of various amounts of shares to Sime Nominees Pte Ltd by the actual receivers of the loan facilities namely Compstate Sdn Bhd, Top Venue Sdn Bhd and Bakti Barat Sdn Bhd; and

(f) A letter from Tan Eam Thong addressed to Steuben Capital Investment (Singapore) Pte Ltd for the attention of the appellant which stated that he was the beneficiary of the loan facilities.

[13] Learned counsel contended that the onus of proof to show that the respondents' decision was wrong was on the appellant. In support reference was made to cases such as *Westpac Banking Corporation & Ors v Totterdell & Anor* [1998] 25 ACSR 769 at pp 772 to 773 and *Tanning Research Laboratories Inc v O'Brien* [1990] 169 CLR 332. He said that the appellant had failed to produce evidence to show that the loan facilities given by him were for the use and benefit of LSSB. Accordingly, it was submitted, the learned judge was right in dismissing the appellant's proof of debt.

DECISION OF THIS COURT

[14] The duty of the liquidator in making a decision and the right of a party to seek a court order to reverse or vary the decision is governed by rr 92 and 93 of the Rules which read as follows:

> Rule 92:
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> The liquidator shall examine every proof of debt lodged with him and the grounds of the debt, and shall in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing in Form 59 to the creditor the grounds of the rejection.
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> Rule 93
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> If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the Court may, on the application of the creditor or contributory, reverse or vary the decision; but subject to the power of the Court to extend the time, no application to reverse or vary the decision of the liquidator in a winding up by the Court shall be entertained, unless notice of the application is given before the expiration of twenty-one days from the date of service of the notice of rejection.

[15] It must be observed that this appeal is essentially grounded on the finding of facts made by the learned judge. Common law cases indicate that the courts are reluctant to interfere with the decision of a liquidator and will do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way. In this regard reference may be made to *Re Edennote Ltd* [1996] 2 BCLC 389 where Nourse LJ said at p 394:

A In general there seems to be something unrealistic in judging the propriety of the acts and decisions of a businessman by asking whether he took into account something he ought not to have taken into account or failed to take into account something he ought to have taken into account.

B That said, it is certainly possible for a liquidator to do something so utterly unreasonable and absurd that no reasonable man would have done it, simply by selling an asset of the company without taking into account the possibility that a third party might well have made a better offer than he to whom it was sold.

C **[16]** The court will not interfere with the decision simply because its opinion might differ from that of the liquidator. Generally, the court will recognize that the discretion has been vested by statute in the liquidator and will not interfere unless it is shown that he did not address himself to the correct questions or has made errors of law (see *Avon Downs Pte Ltd v FC of T* [1949] 78 CLR 353; *Re Mineral Securities Ltd* [1973] 2 NSWLR 207) or has not exercised his discretion bona fide or has acted in a way in which no reasonable liquidator would have acted (see *Leon v York-O-Matic* [1966] 1 WLR 1450) or has taken into account entirely irrelevant considerations (see *Yeomans v Walker & Anor* [1986] 10 ACLR 753) or when there is fraud.

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E **[17]** The learned judge had taken into consideration the various documents tendered by both parties to support his conclusion that LSSB did not take the loan for its own benefit. In particular, he had considered LSSB's audit reports which are a requirement of law for the years 1997 and 1998 to show the movement of the company's financial activities. They did not reveal any loan taken from the appellant as opposed to LSSB's atatement of affairs which did so. But he rightly ruled that they are merely statements made by the company's directors on the company's asset and liabilities. He said correctly that the status of the statement of affairs was not the same as that of the company's audit reports which were audited by a professional auditor. The absence of the loans in the audit reports as explained by the respondents in their affidavits and the exhibits annexed shows that there was an understanding between LSSB and the appellant that the loan was taken for the benefit of LSSB's clients. In particular, exhs 'TMK-3' and 'TMK-6' annexed to exh 'OWC-3' in the affidavit affirmed by the first respondent on 8 Jun 2001 (hereinafter referred to as 'the respondent's affidavit') reveal that the appellant had knowledge that the loans were taken for the benefit of third parties and that they were to charge their shares as security which they did. In this regard a facsimile transmission dated 4 December 1997 from the appellant to Tan Miang Kieng, exhibited as exh 'TMK-7' annexed to exh 'OWC-3' in the respondent's affidavit, shows that the appellant had in fact asked for additional securities such as land in Kuala Lumpur, Pulau Pinang and Bukit Mertajam to be provided by the third parties. The relevant part of the facsimile transmission reads as follows:

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I M K Tan - …

Officially, I have recalled both loans and gave you till 10 Desember 1997 to pay up (if possible) before the next rollover and on the other hand, if you are sincere, get your client

to give me other securities such as land, properties in KL, Penang or Bukit Mertajam and I will discuss with my lawyer Yim Seong and reconsider my official stand which remains unchanged for the time being.

Regards

Chuah

[18] As a matter of fact exhs 'AC-6' and 'AC-7' in the affidavit affirmed by the appellant on 16 May 2001 reveal that with regard to the loan of USD3.8m the securities furnished by the third parties had been taken into account by the appellant in calculating the amount due. Thus, the real borrowers are the third parties of which the appellant was aware. It is therefore clear that LSSB acted only as an agent for the real borrowers to the knowledge of the appellant. There is therefore privity of contract between the real borrowers, who are the principals, and the appellant. In accordance with the principle of law in *Montgomerie & Ors v United Kingdom Mutual Steamship Association* (1891) 1 QB 370 such a contract is the contract of the principal, not that of the agent, and prima facie at common law the only person who can sue is the principal and the only person who can be sued is the principal. This rule is embodied in s 183 of our Contracts Act 1950 and was considered in *Plantation Agencies Sdn Bhd v Haji Ariffin bin Haji Ismail* [1978] 1 MLJ 219. LSSB is thus not a debtor of the appellant.

[19] The proof of debt filed by the appellant is therefore without any merit. Accordingly, we dismissed the appeal with costs.

Appeal dismissed with costs.

Reported by Loo Lai Mee